TRADE MODE SDN BHD & ANOR A

v.

AC PROPERTY DEVELOPMENT SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
DAVID WONG DAK WAH J
[APPLICATION NO: K24-57-2009-I]
25 SEPTEMBER 2009

CONTRACT: *Breach - Damages - Remoteness of damages - Late delivery of vacant possession by developer - Sale and purchase agreement validly terminated by purchaser - Whether purchaser entitled to claim legal fees and costs incurred in obtaining loan financing - Whether 'contemplation test' applicable - Contracts Act 1950 s. 74* C

CONTRACT: *Sale and purchase of property - Breach - Delay in completion - Defendant failed to deliver vacant possession within stipulated time - Time of essence - Whether plaintiffs entitled to rescind contract - Whether presence of liquidated damages clause prevented purchaser from rescinding agreement - Contracts Act 1950 s. 56(1)* D

CONTRACT: *Termination - Validity - Late delivery of vacant possession by developer - Whether purchaser entitled to terminate sale and purchase agreement in lieu of recovering damages for late delivery - Whether such termination valid* E

The plaintiffs respectively entered into a two separate sale and purchase agreements with the defendant for the purchase of properties under construction being developed by the defendant. Both the agreements provided that the respective properties were to be completed and vacant possession handed over within 30 months from the date of the respective agreements failing which the defendant was to pay agreed pre-estimated liquidated damages (cl. 22(c)). The plaintiffs made several payments to the defendant under the agreements and the 2nd plaintiff obtained finance from Hong Leong Bank Bhd. The defendant delayed construction of the project and failed to deliver vacant possession of the properties within the 30 months time frame. The plaintiffs filed this action claiming declarations that the sale and purchase agreements had been validly terminated by the plaintiffs on the grounds that the defendant had committed a fundamental breach of the two agreements allowing the plaintiffs to lawfully terminate the agreements. The defendant contended that the plaintiffs were not entitled to terminate the agreements as the project was still going on and that the plaintiffs were only entitled to liquidated damages F G H I

under Clause 22(c). The defendant also contended that the agreements did not contain any provision for the plaintiffs to terminate for late delivery of vacant possession of the properties.

Held (for the plaintiffs):

(1) The timely delivery of vacant possession of the properties must be regarded of 'major' importance in the circumstance of this case. Clause 7 of the agreements specifically provided that 'time is the essence of the agreement'. This clause reflected the parties' intention to treat the obligation to deliver vacant possession of the properties within 30 months as a condition precedent. It would be unfair to the plaintiffs if they were not able to terminate the agreements and obtain a refund of the monies paid. (para 20)

(2) In the agreements there were provisions for the defendant to terminate if the plaintiffs had defaulted in its payments of the purchase price. Fairness demanded that such reciprocal right was given to the plaintiffs when there was a fundamental breach of the agreement by the defendant. (para 20)

(3) The presence of cl. 22(c) meant that the plaintiffs were given a choice to either terminate the contract or affirm the contract and continue with the performance and claim for agreed liquidated damages upon delivery of possession of the properties. In this case the plaintiffs had elected to terminate. Accordingly the plaintiffs' termination of the agreement had been validly done. (paras 22 & 23)

(4) In relation to the issue of damages, the 'contemplation' test is the correct test to apply as it reflected in s. 74(1) of the Contracts Act, 1950. Applying this test, the damages claimed by the plaintiffs were within the contemplation of the parties when the contract was formed. The refund of monies paid was so obvious that it did not require any reason. As for interest payment made by the 2nd plaintiff, the agreements talked of loan facility to be obtained in the purchase of the property, hence the costs of the loan taken by 2nd plaintiff must have been within the contemplation of the parties. Similarly the legal fees and costs related to the loan facility of the 2nd plaintiff were also within the contemplation of the 2nd plaintiff and the defendant. (paras 25 & 26)

Case(s) referred to:
Araprop Development Sdn Bhd v. Leong Chee Kong & Anor [2008] 1 CLJ 135 CA ***(refd)***
C Czarnikow Ltd v. Koufos [1969] 1 AC 350 ***(refd)***
Gan Hwa Kian & Anor v. Shencourt Sdn Bhd [2007] 3 CLJ 538 HC ***(refd)***
Lim Chon Beng v. Pulau Kembar Sdn Bhd [2005] 6 CLJ 24 HC ***(refd)***
LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***
M-Concept Sdn Bhd v. Berjaya Times Square Sdn Bhd [2004] 4 CLJ 852 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, ss. 40, 56(1), 74(1)

Other source(s) referred to:
Cheshire, Fifoot and Furmston, *Law of Contract*, p 766

For the plaintiffs - Dr David Fung; M/s Alex Pang & Co
For the defendant - Sudirman Lasama; M/s Roland Cheng & Co

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiffs' primary relief is for a declaration that:

(a) The sale and purchase agreement dated 14 July 2005 between the 1st plaintiff and the defendant has been validly terminated.

(b) The sale and purchase agreement dated 23 January 2006 between the 2nd plaintiff and the defendant has been validly terminated.

[2] The relief is premised on the contention that the defendant had committed a fundamental breach of the two agreements allowing the plaintiffs to lawfully terminate the agreements. That alleged fundamental breach relates to the defendant's failure to deliver vacant possession of the properties to the plaintiffs within the time frame as set out in the agreements.

[3] The defendant concedes that there has been a breach but it did not amount to a fundamental breach as the two agreements expressly provide for calculation of damages in the event that there has been a delay in delivering vacant possession of the properties.

Background

[4] The 1st plaintiff entered into a sale and purchase agreement with the defendant for the purchase of property on 14 July 2005 for the price of RM542,776. For the 2nd plaintiff it entered into a sale and purchase agreement with the defendant for the purchase of property on 23 January 2006 for the price of RM3,213,560. The properties are from the project known as 10-storeys Complex Star City-Asia Phase IIC development.

[5] The relevant conditions in the two agreements in this dispute are as follows:

Clause 22:

> (a) The said Parcel shall be completed by the Developer and vacant possession, with the connection of water and electricity supply to the said Parcel, shall be handed over to the Purchaser within Thirty (30) calendar months from the date of this agreement.
>
> (c) If the Developer fails to hand over possession of the said Parcel, together with the connection of water and electricity supply to the said Parcel within the time specified in cl. 22(a) hereinabove but subject to cl. 22(b) the Developer shall pay to the Purchaser agreed pre-estimated liquidated damages to be calculated from day to day at the rate specified in Section 7 Of The First Schedule hereto. (e)

[6] Clause 7 provides that time shall be of the essence of the agreement.

[7] The 1st plaintiff had paid a total sum of RM162,832.80 to the defendant while the 2nd plaintiff had paid a total sum of RM964,068 to the defendant. For the purchase of the property, the 2nd plaintiff obtained finance from Hong Leong Bank Bhd who paid on behalf of the 2nd plaintiff for the sum of RM250,508 under its loan account to the defendant with the balance paid by the 2nd plaintiff itself.

[8] The date for delivery of vacant possession of the property for the 1st plaintiff expired on 15 January 2008 while for the 2nd plaintiff the expiry date was 24 July 2008.

[9] It is undisputed that the defendant had delayed in the construction of the project. In respect of the property of the 1st plaintiff it was only by May 2009 that the defendant completed the ground floor slab. As for the 2nd plaintiff it was only by January

2009 that the defendant completed the ground floor slab of the property. The completion of the ground floor slab entitled the defendant to claim 35% of progress payment.

[10] In view of the defendant's failure to deliver vacant possession of the properties within the 30 months time frame provided for in the two agreements, both the plaintiffs by letters dated 3 December 2008 to the defendant gave notice of termination of the agreements. By two letters dated 18 February 2009 from Messrs Yong & Chia, solicitors at that time acting for them, stating that the plaintiffs have terminated the agreements by their letters of termination and then demanded for refund of the payments made to the defendant amongst other claims. In response to the letters of termination the defendant contended, by two respective letters dated 23 February 2009 to Messrs Yong & Yong, that the plaintiffs were not entitled to terminate the agreement as the project was still going on and that the plaintiffs were only entitled to liquidated damages under cl. 22(c) of the agreements.

Issues

[11] The determinative issues are as set out by the respective parties and they are:

1. Whether or not the two Sale and Purchase Agreements dated respectively 4 July 2005 and 23 January 2006 have been validly terminated for breach of contract by the defendant?

2. If the termination of the respective Sale and Purchase Agreements are valid, what remedies are the 1st and 2nd plaintiffs entitled to?

3. If the termination of the respective Sale and Purchase Agreements are invalid,

   a. are the plaintiffs liable to the defendant for progress payment claims and any overdue interest?

   b. are the plaintiffs entitled to set off the agreed liquidated damages under cl. 22(c) of the respective sale and purchase Agreements payable by the defendant against any part of the progress payment claims and overdue interest claim?

A **Issue 1**

[12] This issue depends on the court's view on whether the defendant's failure to deliver vacant possession of the properties within the agreed time frame amounts to a fundamental breach.

B **[13]** Counsel for the defendant contends that the agreements do not contain any provision for the plaintiff to terminate for late delivery of vacant possession of the properties. Hence any right to terminate can only stem from s. 56(1) of the Contracts Act 1950 read together with s. 40 of the Contract Act.

C **[14]** The sections read as follows:

> 56. Effect of failure to perform at fixed time, in contract in which time is essential.
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> 40. Effect of refusal to party to perform promise wholly.
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence, in its continuance.

[15] It is the counsel's view that the two sections do not give the plaintiffs' right to terminate unless it can be shown that the defendant had refused to perform its promise in its entirety which G is not the case at hand. In his view the defendant here merely failed to deliver vacant possession within the prescribed time frame and the plaintiffs' remedy lies in cl. 22 of the agreement. Counsel also referred the court to the cases of *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434 and *Lim Chon Beng v. Pulau Kembar Sdn Bhd* [2005] 6 CLJ 24. In the former case the H Court of Appeal said:

> ... at common law the right to 'rescind' a contract by way of termination only arises when there has been a total failure of consideration ... where there is a breach of contract there is no right in I an innocent party to reserve the transaction to *status quo* ante; there is only a right to recover damages for breach of contract

> In my judgment, given the fact of the present instance, ss 40 and 56(1) should be read together. When that is done, the question that arises for determination is whether the instant defendant refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract

[16] In the latter case, Justice Low Hop Bing (as he then was) held:

> In my view, the question of whether there is a fundamental breach on the part of the defendant is to be determined by reference to the facts and circumstances of this case, which are in turn to be tested against the express provision of the agreement

[17] Justice Low also referred to the case of *M-Concept Sdn Bhd v. Berjaya Times Square Sdn Bhd* [2004] 4 CLJ 852 where Hishamudin Yunus J (as he then was) held:

> The inability of the defendant to deliver vacant possession of the shop-lot to the plaintiff for such an unreasonable lengthy period of time constituted a fundamental breach of the agreement, thereby entitling the plaintiff to rescind the agreement. Indeed, time was of the essence of the agreement, and excessive delay on the part of the defendant had rendered the agreement voidable at the option of the plaintiff (Contract Act 1950, 56(1)). This was so irrespective of the fact that the agreement did not contain a provision on rescission or the fact that the plaintiff was also entitled to claim liquidated damages for late delivery

[18] Counsel for the defendant then submits that there is no excessive delay in this case as the projected time of completion of the project is around April 2010.

[19] What amounts to a fundamental breach is discussed by learned author in Cheshire, Fifoot and Furmston's – *Law of Contract* at p. 766:

> Of what nature, then, must a breach be before it is called 'fundamental'? There are two alternative tests that may provide the answer. The court may find the decisive element either in the importance that the parties would seem to have attached to the term which has been broken or to the seriousness of the consequences that in fact resulted from the breach. We have already discussed this question at length and suggested that although the tests are often stated as alternatives, they in fact both have a part to play.
>
> If one applies the first test the governing principle is that everything depends upon the construction of the contract in question. The court has to decide whether, at the time when the contract was made, the parties must be taken to have regarded the promise which has been violated as of major or minor importance. In the words of Bowen LJ:

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability"

[20] In my view the timely delivery of vacant possession of the properties must be regarded of 'major' importance in the circumstance of this case. I say this for the following reasons. There is in existence in the agreement cl. 7 which specifically provides that 'time is the essence of the agreement'. This clause reflects the parties' intention to treat the obligation to deliver vacant possession of the properties within 30 months as a condition precedent. This is understandable as I am sure that the plaintiffs in investing in the properties must have taken into account of the 30 months delivery period like any prudent business entity in planning their financial affairs. It would be unfair to the plaintiffs if they were not able to terminate the agreements and obtain a refund of the monies paid so as to enable them to change their plan of investment when they are the innocent parties. It is noteworthy that in the agreement there is provision for the defendant to terminate if the plaintiff had defaulted in its payments of the purchase price. Fairness demands that such reciprocal right is given to the plaintiffs when there is a fundamental breach of the agreement by the defendant. My view is supported by the case of *Gan Hwa Kian & Anor v. Shencourt Sdn Bhd* [2007] 3 CLJ 538 and *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135. Justice Abdul Malik Ishak J (as he then was) in *Gan Hwa Kian* in dealing with the same factual matrix as in this case said this:

> Timely performance was a requisite in the present case. It must be construed as a condition of the contract. Thus, any delay in performance must be treated as a breach of the contract. It went to the root of the contract.

[21] Similar view was expressed by the Court of Appeal in *Araprop Development*.

[22] As for the counsel's contention that because of the presence of cl. 22(c) which allows claims for damages for late delivery the right to terminate by the plaintiff had been taken away. With respect I agree with the construction given by the counsel for the plaintiffs and that is the plaintiffs are given a choice in such circumstance to either terminate the contract or affirm the contract

and continue with the performance and claim for agreed liquidated damages upon delivery of possession of the properties. In this case the plaintiffs had elected to terminate.

[23] Accordingly I find that the plaintiffs' termination of the agreement had been validly done.

[24] Before I consider issue 2, I find that the defendant's contention that the 2nd plaintiff's action had been premature on the ground that at the time of issuance of the letter of termination the 2nd plaintiff had assigned its interest in the property to Hong Leong Banking Bhd to be without merit. Not only that I agree with the view of the Court of Appeal in Araprop Development where they held that the deed of assignment does not prohibit the plaintiff from issuing letter of termination, I am bound by it. In any event the defendant's contention is misguided as it was pointed out by counsel for the plaintiff that the deed of receipt and reassignment between the bank and the 2nd plaintiff was dated 10 February 2009 and the letter of termination of Messrs Yong & Chia's letter was dated 18 February 2009.

Issue 2

[25] This issue relates to damages to be awarded to plaintiffs following the lawful termination of the agreements. Counsel for the plaintiffs relied on the case of *Gan Hwa Kian* where the learned judge in assessing damages adopted what Lord Upjohn said in *C Czarnikow Ltd v. Koufos* [1969] 1 AC 350 and that is "in assessing damages between two contracting parties the court 'should depend on their assumed common knowledge and contemplation and not on a foreseeable but most unlikely consequence'". I have no doubt that the 'contemplation' test is the correct one as this is reflected in s. 74(1) of the Contracts Act 1950 which provides as follows:

> 74. Compensation for loss or damage caused by breach of contract.
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

A (3) Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation
B from the party in default as if the 25 person had contracted to discharge it and had broken his contract.

[26] Applying the above test, I have no doubt in my mind that the damages claimed by the plaintiffs were within the contemplation of the parties when the contract was formed and my reasons are
C these. The refund of monies paid is so obvious that it does not require any reason from me. As for interest payment made by the 2nd plaintiff, the agreements talk of loan facility to be obtained in the purchase of the property, hence the costs of the loan taken by 2nd plaintiff must be within the contemplation of the parties.
D Similarly the legal fees and costs related to the loan facility of the 2nd plaintiff are also within the contemplation of the 2nd plaintiff and the defendant.

Issue 3

E **[27]** In view of my conclusion to issue 1, there is no necessity for me to deal with this issue.

Conclusion

F **[28]** For all the reasons stated above, I declare:

1. That the sale and purchase agreement dated 14 July 2005 between the 1st plaintiff and the defendant has been validly terminated for breach of contract by the defendant;

G 2. That the sale and purchase agreement dated 23 January 2006 between the 2nd plaintiff and the defendant has been validly terminated for breach of contract by the defendant;

I also order that:

H 3. The defendant pays the 1st plaintiff the sum of RM162,832.80;

4. The defendant pays the 2nd plaintiff the sum of RM964,068;

5. The defendant pays the 2nd plaintiff the additional sum of RM54,403.91;

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6. Discretionary interest for the 1st plaintiff pursuant to s. 11 of the Civil Law Act 1956 on the sum of RM162,832.80 at the rate of 4% per annum from 15 December 2005 until the date of this judgment;

7. Discretionary interest for the 2nd plaintiff pursuant to s. 11 of the Civil Law Act 1956 on the sum of RM964,068 at the rate of 4% per annum from 1 January 2009 until the date of this judgment;

8. Interest at the rate of 8% per annum over the judgment sum for the 1st plaintiff and the 2nd plaintiff until the date of full payment;

9. Costs to be taxed unless agreed to the plaintiffs.